SUPREME COURT, U. S.

FILED

MAY 19 1975

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1310

EDWARDS UNDERGROUND WATER DISTRICT; BEXAR COUNTY, TEXAS; CITIZENS FOR A BETTER ENVIRONMENT; and LEAGUE OF WOMEN VOTERS,

Petitioners,

v.

CARLA A. HILLS (JAMES T. LYNN), SECRETARY OF THE U. S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; and SAN ANTONIO RANCH, LTD.,

Respondents.

BRIEF OF RESPONDENT, SAN ANTONIO RANCH, LTD., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SEAGAL V. WHEATLEY
Suite 620, 711 Navarro
San Antonio, Texas 78205
Attorney For Respondent,
SAN ANTONIO RANCH, LTD.

CARL ROBIN TEAGUE
(On The Brief)
Oppenheimer, Rosenberg,
Kelleher & Wheatley, Inc.
of Counsel

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BRIEF OF RESPONDENT, SAN ANTONIO RANCH, LTD., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, San Antonio Ranch, Ltd. (the "developer"), respectfully prays the Court to deny the Petitioners' Petition For Writ of Certiorari to the United States Court Of Appeals For The Fifth Circuit.

Questions Presented For Review

1. Whether HUD included in its recommendation on the proposed Federal action a detailed statement (Environmental Impact Statement or "EIS") on alternatives to the proposed action.

2. Whether the responsible Federal official made the Environmental Impact Statement that is a part of the record of this cause.

3. Whether HUD included in its recommendation on the proposed Federal action a detailed statement on the environmental impact of the proposed action.

4. Whether HUD's Environmental Impact Statement was made by the responsible Federal official prior to the making of the decision to take Federal action.

5. Whether HUD's action complied with the provisions and terms of the Urban Growth and New Community Development Act of 1970.

Reasons For Denying The Writ

I. The Court of Appeals did not render a decision in conflict with the decision of any other court of appeals on the same matter.

II. The Court of Appeals' decision is clearly correct.

III. The Court of Appeals has not decided an important question of federal law which has not been, but should be, settled by this Court.

ARGUMENT

I.

The Court Of Appeals Did Not Render A Decision In Conflict With The Decision Of Any Other Court Of Appeals On The Same Matter.

A. The Decision On The Statement On Alternatives To The Proposed Action.

A rule which several courts of appeals have applied to determine if the responsible Federal official made a detailed statement on alternatives to the proposed action is that the agency recommending a proposed action "must—to the *fullest* extent possible under its other statutory obligations —consider alternatives to its action which would reduce environmental damage." *Calvert Cliffs' Coordinating Committee* v. *AEC*, 449 F. 2d 1109, 1128 (D.C. Cir. 1971), cert.

denied, 404 U.S. 942 (1972); accord, *Iowa Citizens For Environmental Quality, Inc.* v. *Volpe*, 487 F. 2d 849, 851-852 (8th Cir. 1973). This Court of Appeals applied the same rule to HUD's EIS and concluded that such EIS, tested by the "rule of reason", satisfied NEPA's requirements. 502 F. 2d at 61-62. Any distinction between this conclusion and the conclusion of any other court, including those cited by Petitioners (Pet. for Cert., at 13-22), would be and is based on the application of a rule to different fact situations. Not having established a rule that "something less than compliance 'to the fullest extent possible' is acceptable", however, the Court obviously did not decide to establish a rule that conflicts with a rule established by another court of appeals.

B. The Decision On Whether The Environmental Impact Statement Was Made By The Responsible Federal Official.

NEPA imposes upon the "responsible official", Section 102(2)(c), the duty to make the EIS. In *Greene County Planning Board* v. *FPC*, 455 F. 2d 412 (2d Cir.), cert. denied, 409 U.S. 849 (1972), the Court described the action taken by the FPC pursuant to NEPA:

> Section 281(b) of the [FPC's] regulations [designed to implement procedures in accord with NEPA] required each applicant for a license for a 'major project' to file its own detailed statement of environmental impact developing fully the five factors listed in Section 102(2)(c) of NEPA. . . . The Commission reviewed the [applicant's] statement as to sufficiency of form . . . and then circulated it for comment. . . . *Id.* at 416-417.

In accordance with Section 102(2)(c), that court decided the rule is that "(t)he primary and nondelegable respon-

sibility for [considering environmental values at every distinctive and comprehensive stage of the agency's process] lies with the [agency]. *Calvert Cliffs' Coordinating Committee, Inc.* v. *United States Atomic Energy Commission*, 449 F. 2d 1109, 1119 (D.C. Cir. 1971)." *Id.* at 420. Applying, then, that rule to the facts, that Court concluded that "(t)he Federal Power Commission . . . abdicated a significant part of its responsibility by substituting the statement of [the applicant] for its own." *Id.* at 420. This Court of Appeals certainly did not decide to establish any rule that conflicted with the *Greene County* rule. 502 F. 2d at 59. Rather, it followed that rule: "NEPA's commands . . . do not permit the responsible federal agency to abdicate its statutory duties by reflexively rubber stamping a statement prepared by others. The agency must independently perform its reviewing, analytical and judgmental functions and participate actively and significantly in the preparation and drafting process. See *Green County Planning Board* v. *F.P.C.*, 455 F. 2d 412 (2d Cir.), cert. denied, 409 U.S. 849, 93 S. Ct. 56, 34 L.Ed. 2d 90 (1972)." *Id.* In applying that rule to a different fact situation, however, this Court of Appeals concluded that HUD did not abdicate its responsibility as did the FPC. *Id.*

C. The Decision On Whether HUD Included In Its Recommendation On The Proposed Federal Action A Detailed Statement On The Environmental Impact Of The Proposed Action.

Section 102(2)(c)(i) imposes upon the responsible official the duty to make a detailed statement on the environmental impact of the proposed action. The Court of Appeals in *Silva* v. *Lynn*, 482 F. 2d 1282 (1st. Cir. 1973), impliedly decided that the statement on the environmental impact of the proposed action must include a statement on both "primary" and "secondary" impacts. *Id.* at 1286.

This implied decision would be in accord with some guidelines for preparing Environmental Impact Statements: CEQ Guidelines, 36 Fed. Reg. 7725 (April 23, 1971); 40 C.F.R. § 1500.8(a)(3)(iii). This Court of Appeals did not decide otherwise. Instead it impliedly rendered a similar decision. 502 F. 2d at 60-61. Upon application of the same rule that was impliedly recognized in *Silva* v. *Lynn, supra*, however, this Court of Appeals made a conclusion, based upon a different fact situation, that HUD's EIS satisfied the duty imposed by section 102(2)(c)(i). 502 F. 2d at 60-61.

D. The Decision On Whether HUD's EIS Was Made Prior To The Making Of The Decision To Take Federal Action.

This Court of Appeals did not decide to establish a rule that HUD, or any other federal agency, could make a decision to take federal action and then make an EIS in which it could give merely *pro forma* consideration to environmental factors or in which it could make a *post hoc* rationalization of such decision. Instead, this Court of Appeals recognized the principle, based on section 102(c)'s provision that the EIS "shall accompany the proposal through the existing agency review processes", that the EIS must be made at a meaningful time in the decision-making process. 502 F. 2d at 59-60. Thus this Court of Appeals undoubtedly rendered no decision that is in conflict with any other Court of Appeals decision that an EIS must not be merely a *pro forma* statement or a *post hoc* rationalization of the agency's decision to take action. Again this Court of Appeals has decided to follow and apply the same principles and rules that other Courts of Appeals have decided to establish or follow, but, upon application of such principles and rules to different situations, has concluded that HUD's EIS was timely made.

II.

The Court Of Appeals Decision Is Clearly Correct.

A. The NEPA Issues.

The purposes to be served by an EIS are to enable those who did not have a part in its making to understand and consider meaningfully the factors involved, *Trout Unlimited* v. *Morton*, 509 F. 2d 1276, 1282 (9th Cir. 1974); *Silva* v. *Lynn*, *supra*, 482 F. 2d at 1284-1285; *Environmental Defense Fund* v. *Corps of Engineers*, 470 F. 2d 289 (8th Cir. 1972), and to compel the decision maker to give serious weight to environmental factors in making discretionary choices, *Silva* v. *Lynn*, *supra*, 482 F. 2d at 1284-1285; *Monroe County Conservation Council, Inc.* v. *Volpe*, 472 F. 2d 693 (2d Cir. 1972); *Committee For Nuclear Responsibility* v. *Seaborg*, 463 F. 2d 783 (D.C. Cir. 1971); *National Helium Corp.* v. *Morton*, 455 F. 2d 650, 656 (10th Cir. 1971); *Calvert Cliffs' Coordinating Committee, Inc.* v. *AEC*, *supra*, 449 F. 2d at 1114. Section 102(2)(c) contains the procedural requirements designed to compel all federal agencies contemplating taking action having a significant impact on the environment to consider NEPA's policies and goals as enunciated in Section 101. The federal agency must comply with the duties imposed upon it by section 102(2)(c) "to the fullest extent possible", *Iowa Citizens For Environmental Quality, Inc.* v. *Volpe*, *supra*, 487 F. 2d at 851; *Calvert Cliffs' Coordinating Committee, Inc.* v. *AEC*, *supra*, 449 F. 2d at 1114-1115. A court's decision, however, as to whether the federal agency has complied with section 102(2)(c) is governed by a "rule of reason", i.e., the reviewing court must recognize, as did this Court of Appeals, on the one hand that NEPA mandates that no agency limit its environmental activity by the

use of an artificial framework and on the other that the Act does not intend to impose an impossible standard on the agency. *Carolina Environmental Study Group* v. *AEC*, 510 F. 2d 796 (D.C. Cir. 1975); *Trout Unlimited* v. *Morton, supra*, 509 F. 2d 1276; *Lathan* v. *Brinegar*, 506 F. 2d 677 (9th Cir. 1974). Furthermore, the courts have understood that Congress did not intend to mandate perfection. See, e.g., *EDF* v. *Corps of Engineers*, 342 F. Supp. 1211, 1217, *aff'd*, 472 F. 2d 289 (8th Cir. 1972).

Since HUD's EIS clearly enabled those who did not participate in making it to understand and consider meaningfully the factors involved and compelled the decision maker to give serious weight to environmental factors in making the decision, upon application of the "rule of reason" HUD's EIS clearly satisfies at least the minimum requirements of section 102(2)(c).

B. The New Community Act Issues.

The Court of Appeals concluded that the District Court's findings of facts on these issues, 364 F. Supp. at 839, were not clearly erroneous. 502 F. 2d at 55. Based upon these findings the District Court concluded, as did the Court of Appeals, 502 F. 2d at 57, that HUD did not act arbitrarily or capriciously, and did not fail to act in accordance with law, when it decided to assist the developer pursuant to the Act. *Id.* The petitioners' attack on the lower court's findings of facts has been conclusively resolved against it by the Court of Appeals.

The Petitioner's assertion that the developer's proposed project may inflict destruction upon the standard of living for Bexar County's one million people (Pet. for Cert., at 29), is a dramatic statement, designed to excite and scare, which has not been found by either of the lower court's to have any evidentiary support.

Both of the lower court's opinions deserve careful reading. A comparison of those opinions with the Petition for Certiorari will without any effort on the developer's part, persuade this Court that Petitioners' are not arguing any legal point but are merely, as previously stated, rearguing evidentiary points which were not persuasive to the courts below and should not have any effect on the issue of whether this Court should review the cause. The Court of Appeals' statement is conclusive:

> Not only did both HUD and the developer endeavor to work closely and cooperate fully with state, local and city officials, the record also shows that the Ranch project "is consistent with comprehensive planning . . . determined by the Secretary to provide an adequate basis for evaluating the new community development program in relation to other [state, local and private] plans and activities . . . ," 42 U.S.C. § 4513(a)(4), and "has received all governmental reviews and approvals required by State or local law, or by the Secretary," 42 U.S.C. § 4513 (a)(5).

Petitioners seek to extract bits and pieces of evidence from the voluminous record below and draw their own conclusions from such isolated evidence (Pet. for Cert., at 31-35). As to each bit of extracted evidence it must be noted that there were scientific studies and technical studies conducted by geologists, hydrologists, microbiologists, urban experts, CPA's and a host of other well-qualified experts who conducted studies in each area of consideration involved and the substantial evidence supported HUD's favorable findings. The Court of Appeals reviewed these efforts by HUD and stated, at 55-56:

Urging that HUD made no studies of the Ranch's impact on San Antonio urban problems (transportation facilities, minority and low income distribution, inner city tax base, balanced growth or revitalization of the central city), plaintiffs argue that the Ranch cannot be consistent with comprehensive planning for the entire urban area, as required by section 4513(a)(4) and HUD regulations (since no such plan exists), and that Bexar County, which must become responsible for governing and servicing the development, was never asked to approve the Ranch, as mandated by section 4513(a)(5).

The administrative record demonstrates that from the beginning HUD conceived of the Ranch as an integral element of the entire San Antonio community. The myriad economic, marketing, environmental and urban studies indicated that the project would provide a viable alternative (preserving and enhancing the existing natural amenities) to the rapid and disorderly urban growth projected for the northwest quadrant of Bexar County, an area devoid of governmental land use regulations or comprehensive water resource management planning. It is anticipated that this growth phenomenon will be exacerbated by the nearby construction of the University of Texas at San Antonio and the South Texas Medical Center. Thus, the orderly development of the Ranch should advance the goals of Title VII by retarding the expected and otherwise inevitable urban sprawl over the aquifer through implementation of a comprehensive land use plan which institutes demanding environmental controls in an ecologically sensitive area as well as by contributing to the welfare of the entire San Antonio community.

HUD evaluated the project's feasibility and its interrelation with the City of San Antonio by examining regional growth trends, population and employment distribution, market potentials, adequacy of regional transportation facilities and the long-term fiscal and economic impact of the Ranch on its adjacent political jurisdictions. These areas of concern were treated in the August 1971 report of the Assistant Secretary of HUD to the Community Development Board of Directors. He examined and the Board approved the Ranch with respect to each requirement of section 4513 and all applicable HUD regulations. To allay fears that the Ranch would counteract efforts to revitalize the downtown area of San Antonio, the developer submitted expert studies to the City Council that indicated a minimally harmful, if not an overall beneficial, economic impact on the city and its tax base from the project. As a result the City Council rescinded its prior unfavorable position as to the Ranch and in February of 1972 voted to adopt a resolution supporting annexation of the Ranch in the future and to execute an agreement of cooperation with the developer: (a) to institute measures to protect the Edwards reservoir from pollution, (b) to channel all urban-type federal grants through the City, (c) to seek assistance from the developers with planning, analysis and feasibility studies for a possible Title VII new-town-in-town project in San Antonio, and (d) to provide water, gas, electricity, sewerage and other municipal services to the Ranch under contract with the developer. In responding to comments to the "final" environmental impact statement, HUD stated that it would give full consideration to a new-town-in-town com-

munity in San Antonio regardless of the final action it took as to the Ranch.

The Court of Appeals stated further, at 57:

> The record before us does not support the claim that HUD failed to consider all relevant Title VII factors in reaching its decision or that the decision itself manifests a clear error in judgment. The legislative history of Title VII and HUD regulations thereunder clearly contemplate federal assistance for "free standing and self-sufficient new communities away from existing urban centers where there is a clear showing of economic feasibility, primarily . . . to accommodate [expected] population growth," as well as for new communities in metropolitan areas that are designed to combat urban sprawl and to renew deteriorating central cities. *See* proposed HUD Reg. § 32.7(a), 36 Fed. Reg. 14207 (1971). We hold that Secretary Lynn acted neither arbitrarily nor capriciously, nor failed to act in accordance with law when he determined to grant the developers of the Ranch federal assistance under the Urban Growth and New Community Development Act.

Petitioners next seek to assert that the Court of Appeals erred in finding that the Alamo Area Council of Government had conducted an ongoing comprehensive plan at HUD's behest, and, because the Court erroneously so found, that the project does not comply with HUD's regulations which require that the project comply with comprehensive area-wide plans. (Pet. for Cert., at 33-34).

This Court need only refer to the Court of Appeals' opinion for a detailed reply to this argument wherein Judge

Clark correctly wrote on the comprehensive planning issue, and applied the proper law. As Judge Clark stated, at page 57:

> Title VII does not state that the existence of a comprehensive regional land use is a condition precedent to federal assistance or that if no such plan is in effect, the Secretary must exercise his statutory authority to make comprehensive planning grants available to official governmental planning agencies where rapid urbanization is expected to occur on property to be developed as a new community, *see* 40 U.S.C. § 461. In this vein, draft HUD regulations provide that "the area within which a new community is to be situated must be covered by a comprehensive areawide plan *or by ongoing planning promulgated or carried on by a duly authorized agency.*" Proposed HUD Reg. § 32.7(f), 36 Fed. Reg. 14208 (1971) (emphasis added). These regulations also state that the comprehensive planning for the area must, in the secretary's judgment, be sufficiently detailed to provide a reasonable basis for evaluating the relationship of the proposed new community to other state, local and private plans and activities and that in those areas with a regional planning agency certified by the secretary, consistency must be found between the new community and the planning conducted by such agencies.
>
> Plaintiffs do not assert that the Alamo Area Council was improperly certified by HUD or defaulted in its A-95 and regional planning responsibilities. There is no evidence that the council (among whose 16 members were representatives from plaintiff-intervenors, Edwards Underground Water Dis-

trict and Bexar County) inadequately discharged its planning and reviewing functions or erroneously determined that the Ranch was a viable project. Its conclusions were independently corroborated by various other local governmental agencies and were approved by the district court. Finally, that no official endorsement of the Ranch by Bexar County is required by state law is verified by a letter to HUD approving the Ranch from Bexar County Commissioners Court Judge Blair Reeves, who stated that though the county had no planning or zoning responsibility under existing state law, he found the project to be consistent with the San Antonio metropolitan area goals. This point was mooted in April of 1974 when the City Council of San Antonio voted to extend the city's extra-territorial jurisdiction over the Ranch from 58% to 100% of the proposed site.

Therefore, the petitioner's position on this point is exceptionally weak, and, as Judge Clark stated, Bexar County, one of the petitioners herein, had through its County Judge, written a letter to HUD stating that as County Judge, he found the project to be consistent with the San Antonio Metropolitan Area goals.

Finally, Petitioners complain about the Court of Appeals' decision that neither the "national urban growth policy", 42 U.S.C. § 4502(d), nor the description of the results of continuation of established patterns of urban development, 42 U.S.C. § 4511(b), created any judicially enforceable rights. While this decision is manifestly correct, it is not material to the judgment because the Court of Appeals did not find that HUD absolutely failed "to adhere to the Congressional purposes and intents expressed in the Act" (Pet. for Cert., at 35), or that the action HUD

took "under authority of [the Act] is contrary to the purposes and goals of that authorizing Act". (Pet. for Cert., at 36). *Shannon* v. *HUD*, 436 F. 2d 809 (3d Cir. 1970), is clearly distinguishable from the present case because in it that Court found that the Federal agency's decision was made without consideration of relevant factors and concluded that the agency's decision violated rights conferred upon persons by the Civil Rights Acts.

III.

The Court Of Appeals Has Not Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

The second "reason" Petitioners give for this Court to review the cause is that "HUD's commitment to the Developer violates the New Community Act." (Pet. for Cert., at 28). This statement is merely a point that the Court of Appeals erroneously affirmed the District Court's judgment but is not a statement of an appropriate reason why this Court should review the cause. The Petitioners also state "(b)ecause of its magnitude and the potential destruction that the proposed project may inflict upon the standard of living for Bexar County's one million people . . . a Writ of Certiorari should issue. . . . (Pet. for Cert., at 29). This reasoning is also completely unrelated to the appropriate reasons for this Court to review a cause. The mere statement that "the New Community Act has not yet received any interpretation by this or any other appellate court except the court below" does not even pretend to state why the Court of Appeals decided an important question of federal law that should be decided by this Court. Further reply in opposition to the petition seems very unnecessary.

CONCLUSION

For the reasons stated herein, Respondent San Antonio Ranch, Ltd., respectfully prays the Court to deny the Petition For Writ of Certiorari.

Respectfully submitted,

SEAGAL V. WHEATLEY
Suite 620
711 Navarro
San Antonio, Texas 78205
Telephone: 512-224-7581

Attorney for Respondent,
SAN ANTONIO RANCH, LTD.

CARL ROBIN TEAGUE
(On The Brief)
Oppenheimer, Rosenberg,
Kelleher & Wheatley, Inc.
of Counsel